



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2005

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2005-04579

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224889.

The Lytle Independent School District (the "school district"), which you represent, received a request for "any and all e-mails or memos from [the superintendent] to [school board members] from Feb. 17th thru March 1." You inform us that the school district has released some information to the requestor but claim that portions of the submitted documents are excepted from disclosure under sections 552.101, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted information that you claim "falls outside the scope of the request." In this instance, the requestor seeks "any and all e-mails or memos" between identified parties during a specified period. You have redacted portions of the content of e-mails between the parties during the period at issue. You do not indicate that the requestor has narrowed the scope of the request. See Gov't Code § 552.222 (allowing governmental body to ask requestor to clarify or narrow request for information). We, therefore, cannot agree that any portion of an e-mail or memo between the named parties and during the specified period is beyond the scope of this request. In accordance with section 552.301 of the Government Code, the school district was required to request a ruling on all information you seek to withhold from the requestor. Because you have failed to comply with the procedural requirements of section 552.301 with respect to this information, the information

is presumed to be public. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because we are unable to review the redacted information, we have no basis for finding that the redacted information is confidential by law or excepted from disclosure pursuant to your claimed exceptions. Thus, we find the school district must release the redacted information to the requestor. If you believe that the information you redacted is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

We next address the exceptions to public disclosure you claim for the submitted information. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that a portion of the submitted information consists of communications between the school district and its legal counsel, and that these communications were made in furtherance of the rendition of professional legal services to the city. You further explain that the communications were intended to be confidential and that they have not been shared with any non-privileged parties. Upon review of your arguments and the responsive information, we agree that the school district may withhold the remaining portion of the document it seeks to withhold under section 552.107(1) of the Government Code. As our ruling under section 552.107(1) of the Government Code is dispositive with regard to the information that you claim is subject to the attorney-client privilege, we do not address your arguments under rule 503 of the Texas Rules of Evidence.

You also note that the submitted information contains personal e-mail addresses of members of the school district's board. Section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts certain e-mail addresses of members of the public, or personal e-mail addresses of officers or employees of a governmental body, who have not affirmatively consented to their release. Provided the individuals at issue have not consented to the release of their e-mail addresses, the school district must withhold the e-mail addresses it has marked pursuant to section 552.137.

In summary, the school district must release the information redacted from the submitted documents. The school district may withhold the remaining portion of the document which it claims consists of attorney-client communications under section 552.107(1) of the Government Code. The school district must withhold the submitted personal e-mail addresses it has marked under section 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll


free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 224889

Enc. Submitted documents

c: Ms. Kala Barthram
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